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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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FREDERICK B. KROL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

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## PETITION FOR A WRIT OF CERTIORARI

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*To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:*

Your petitioner, Frederick B. Krol, (hereafter called defendant) respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on February 27, 1967.

## JUDGMENT AND OPINION OF THE COURT BELOW

On February 27, 1967, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to a term of eighteen months imprisonment. The Court of Appeals' Opinion has not as yet been reported; it is printed herewith as Appendix "A".

## JURISDICTIONAL STATEMENT

On a trial to the court without a jury, the defendant, a lawyer, was convicted of aiding and abetting one Carl Madda, another lawyer, corruptly to give $200 to one Erwin Katz, an assistant United States Attorney, with intent to influence Katz' decision in connection with a civil case Katz was handling for the government, in violation of 18 U. S. Code, Sections 2 and 201(b).

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an Opinion filed February 27, 1967 (Appendix "A").

A petition for rehearing was timely filed and was denied on April 17, 1967 (Appendix "B").

The jurisdiction of this court is invoked under the provisions of Title 18, U.S. Code, 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Can defendant's assertion of his constitutional right to counsel and can his reliance upon his constitutional right to remain silent be permitted in evidence and used against him merely because the trier of the facts was a judge and not a jury?

Are constitutional rights and privileges different for those who stand trial before a court than before a jury?

May such evidence—defendant's reliance on his constitutional right to counsel and his right not to answer questions when interrogated by FBI agents—be thrice repeated during trial without violation to defendant's constitutional right to a fair trial?

May the Court of Appeals be permitted to condemn "resort to this strategy for the purpose of bringing the content of the conversations to the court's attention" while at the same time be permitted not to "regard the impropriety as constituting prejudicial error which requires a reversal" because "this was a bench trial"?

2. In the face of an Illinois statute rendering telephone electronic recordings as inadmissible in evidence as interpreted by an Illinois Supreme Court decision (*People* v. *Kurth*, 34 Ill. 2d 387) may a conviction be sustained where such electronic recordings were made of telephone calls in the light of this court's expressions in *Lopez* v. *United States*, 373 U.S. 427, suggesting that if the manner of securing electronic recordings were in violation of some statute or rule such evidence should be excluded?

Where the Court of Appeals has held that "federal and not state law furnishes the standard governing admissibility of evidence in a federal court" where electronic telephone recordings were admitted in violation of an Illinois statute making such eavesdropping a crime punishable by fine or imprisonment and further declaring such evidence inadmissible in

any civil or criminal proceeding, may such holding be sustained where federal statutes are silent on the subject?

In the light of this court's pronouncements in *Lopez* v. *United States*, 373 U.S. 427, should not this court make known its views now that both Illinois statutes and decisional law prohibit the use of electronic recordings in criminal trials?

3. Where a defendant is indicted on two counts, one of aiding and abetting a named individual to influence a federal official in his decisions and one of conspiracy with that same person to do so, may an inconsistent verdict be suffered to stand when the trial judge found the defendant not guilty on the conspiracy count, but guilty on the aiding and abetting count where the evidence was the same for both counts?

In this context, is not the holding by the Seventh Circuit in direct conflict with the holding of the Second Circuit in *United States* v. *Maybury*, 274 F.2d 899 which reversed for a trial judge's inconsistent verdict?

## STATUTES INVOLVED

Title 18 U.S. Code, Sections 2 and 201(b) (relevant portions set out in Appendix "C").

Chapter 38, Sections 14-1, 14-2, 14-4 and 14-5, Illinois Revised Statutes, 1963 (relevant portions set out in Appendix "C").

## STATEMENT OF THE CASE.

The defendant, a young attorney, was counsel of record for the plaintiff in a civil action (*Janus* v. *United States*) which was pending in the district court in Chicago in which action Janus sought to recover damages under the Federal Tort Claims Act for injuries sustained in a collision involving a post office vehicle. Another attorney, Carl J. Madda, was handling the *Janus* case for Krol, while assistant United States Attorney Erwin Katz represented the government. On December 17, 1963, Katz increased to $500 a prior offer he had made to Madda that the government settle the case for $300. The defendant conveyed the $500 offer to his client, Janus, indicating that it was a "ridiculous" offer. Later, on December 17, Katz went to Krol's law office where he saw Madda and met Krol for the first time (A. 8).[1] Katz testified that while in Krol's office, Madda twice offered Katz $200 to settle the case for $2,000. Katz was seated opposite Krol and Madda was about three feet to Katz' right, facing Krol. According to Katz, Krol, who was engaged in telephone conversations in response to a call, did not hear Madda make the offers.[2]

Krol testified at Madda's trial that Katz initiated the bribe offer. At the Madda trial, Krol was asked whether he knew that $200 was paid to Erwin Katz and Krol said

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[1] "A" refers to the Appendix of the trial record filed with this Petition.

[2] In a separate previous trial, Madda was convicted of a Section 201(b) violation in connection with the incidents involved and his conviction was affirmed, *United States* v. *Madda*, 7 Cir., 345 F.2d 400.

he learned that from a newspaper report he had read after Madda's arrest. (A. 38). Also, at Madda's trial Krol testified he had left a check for $200 with his secretary to give to Carl Madda on December 19 and that the secretary cashed the check on that morning (A. 39).

**Evidence regarding defendant's reliance on his constitutional right to lawyer consultation and on his right to silence.**

Madda was arrested on December 19, 1963 (A. 18).

Over defense objections, FBI agent Bloom testified that in the company of another agent he spoke to defendant on December 31 at Krol's office. The agent wanted to discuss Madda's arrest and Krol said he didn't care to discuss it (A. 36). The agents again spoke to Krol in his office on January 2, 1964. Over defense objections, the witness was permitted to state his conversation with Krol that they wanted to discuss Madda's arrest and Krol again "told us that he did not desire to make any statements regarding the arrest of Madda" (A. 37). He had previously spoken to Krol on the telephone on December 23, 1963, and wanted to make an appointment to see him regarding the arrest of Madda. Krol said that he would like to consult with an attorney before he made any statements (A. 37).

**The matters relating to the tape recorded telephone and other conversations.**

Prior to trial, defendant moved to suppress certain tape recordings of telephone conversations between himself and government witness Katz on December 18, 1963;

and further moved to suppress electronic recordings of conversations between Madda and Katz made at several places on December 18 and 19, 1963 (A. 2-3).

The evidence in this connection was as follows: Assistant U. S. Attorney Erwin Katz testified that attorney Carl Madda, representing plaintiff in a tort claim case, *Janus* v. *United States*, offered to give him $200 if Katz would increase the offer to settle the case from $500 to $2,000. This proposal was made when Katz went on December 17, 1963 to the law office of Krol at 120 West Madison Street where he met with attorney Madda who was handling the case. On the next day, December 18, 1963, at about 3:00 P.M., FBI agent Parfet affixed a tape recorder to the receiver of a telephone Katz was using by means of a suction device (A. 10). Katz gave Parfet consent so to do and to record his telephone conversation. He spoke to Krol; that conversation was electronically recorded. Over objections, he testified that what appeared on the tape of the recording device accurately recorded the conversation he had with Krol (A. 11-12). The telephone tape was introduced over objections as Gov't Ex. 13, and the recording is set out at Appendix 19-22.

In addition, Gov't Ex. 13, received in evidence over defense objections, recorded a telephone conversation of a call made from Madda to Katz at about 4:00 or 4:15 P.M. on December 18, 1963. There was no showing Madda gave his consent to the taping. The content of that telephone conversation is reproduced at Appendix 23.

Additional tape recordings were introduced as Gov't Ex. 10B, being an electronic recording of a conversation between Madda and Katz held at the Jockey Club of a

hotel on December 18, 1963 (A. 24). That recording, received in evidence over objections, appears at Appendix 25-30.

When the government offered exhibits 10B and 13, the defendant objected on the ground that the evidence was procured unlawfully (A. 41). The trial court specifically acknowledged that the Supreme Court of Illinois had just decided a case exactly in point, mentioning *People* v. *Kurth*[3] (A. 41), but nonetheless stated, "Well, objection is heard, considered and denied."

The tapes were admitted into evidence (A. 41).

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[3] 34 Ill. 2d 387; 216 N.E. 2d 154 (1966).

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

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### I.

**Are there different constitutional standards for trials before a court as distinguished from those before a jury?**

**Where the Court of Appeals agrees that the trial court improperly permitted a government agent to testify that defendant desired to consult with an attorney before he talked with the FBI agent, and that he did not desire to make any statements, could that court disregard the admitted error merely because defendant's trier of the facts was a judge and not a jury?**

**Is the invocation of the constitutional privilege of lawyer consultation and of the privilege to remain silent permitted even a lawyer who happens to be charged with a crime?**

Over defense objections, FBI agent Bloom testified that he spoke to Krol on January 2, 1964, and that Krol "told us that he did not desire to make any statements regarding the arrest of Madda".

The agent also testified that he spoke with Krol on December 23, 1963, that he then told Krol he wanted to make an appointment to see him about the arrest of Madda and Krol said, ". . . he'd like to consult with an attorney and I believe he said—he told me that he desired to consult with an attorney prior to making any statement." (Tr. 36-37.)

It is no consideration of guilt that the defendant declined to make statements or that he preferred to consult with an attorney before he made statements. Such was his constitutional right. The admission of this evidence was prejudicial, since it was neither material nor relevant to the issue being tried. A citizen is within his right when he refuses to make a statement; and the fact that he exercised such right has no tendency to prove or disprove the charge against him.

Uniquely, the Court of Appeals agreed that the government's tactic was error, for it said,

> "We agree with the defendant that the court, over defendant's objections, improperly permitted a government agent to testify that when, subsequent to Madda's arrest, the agent sought to interview Krol concerning the matter, Krol told him over the telephone that he desired to consult with an attorney prior to making any statement, and that when he visited Krol's office on two subsequent occasions, Krol told him that he did not desire to make any statement regarding Madda or the arrest of Madda." (App. "A".)

And further, the reviewing court stated,

> ". . . resort to this strategy for the purpose of bringing the content of the conversations to the court's attention is to be condemned. (Cf. *United States* v. *Watkins*, 7 Cir., 369 F.2d 170)." (App. "A".)

However, the court held,

> "But, this was a bench trial, and we do not regard the impropriety as constituting prejudicial error which requires a reversal." (App. "A").

Only under peculiar circumstances can there be any duty to speak to investigating officers during an official inquiry. *United States* v. *Pearson*, 6 Cir., 344 F. 2d 430 (1965).

The Fifth Circuit reversed a conviction because of an identical situation, *Baker* v. *United States,* 357 F. 2d 11 (1966). The court held (pp. 13-14):

> "... it was reversible error to have allowed the FBI agent to testify that when appellant was first questioned, he indicated that he wanted a lawyer and thereafter made no further statement ... In asking for counsel before making any statement, appellant was exercising a constitutional right which the Supreme Court has time and again declared to be guaranteed to all persons accused of crime. To have proven that appellant requested the right of counsel and thereafter made no further statement, was, we feel, as objectionable as it would have been to comment on a defendant exercising his constitutional right not to take the witness stand."

Similarly, the First Circuit reversed the conviction in *Fagundes* v. *United States,* 340 F. 2d 673 (1965), even though the evidence was "clearly enough to warrant the jury's verdict." When the defendant testified to an alibi in connection with his defense of an accusation of robbery, he was asked, "... why he had not protested his innocence when he was arrested instead of refusing to say anything and asking to see a lawyer ..." (p. 677). This error was of constitutional proportions. For, as the court said, p. 677:

> "His assertion of one constitutional right, his right to counsel, and his reliance upon another constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance."

The right to silence upon interrogation is akin to the right of the defendant not to take the witness stand in his own defense, *Helton* v. *United States*, 5 Cir., 221 F. 2d 338, 341-342.

Invoking the constitutional privilege against self-incrimination does not give rise to an inference that the witness has done something wrong or that he is guilty of an offense, *Grunewald* v. *United States*, 353 U.S. 391.

This court's most recent expression in *Spevack* v. *Klein*, 385 U.S. 511 (decided January 16, 1967) held that lawyers are not second class citizens with respect to the invocation of their constitutional rights. There, a lawyer's refusal to testify about the performance of his duties was held to be improper grounds for disbarment. Here, a lawyer's refusal to answer questions of an interrogating FBI agent before he consulted with his own lawyer and his insistence upon remaining silent ought not to have been used as evidence against him.

The admitted impropriety is of constitutional proportions.

And although the Court of Appeals condemned the prosecutorial misconduct, defendant is condemned to imprisonment (not to mention other incidental punishments which will flow from the conviction.)

## II.

**This Court should announce whether evidence obtained by means of electronic eavesdropping in violation of a specific state statute may be used in a federal prosecution.**

**Where federal officers and agents violate the criminal laws of a State in the gathering of evidence, may such evidence be admitted in a federal prosecution?**

Prior to trial the defendant moved to suppress electronic recordings of certain telephone and other conversations made in violation of the Illinois Criminal Code, Chap. 38, sec. 14-1 *et seq.*, of the Illinois Revised Statutes, 1961 (A. 2). The motion was denied and tape recordings, Gov't Ex's. 10B and 13, were admitted into evidence. Exhibit 13 was a recording of a phone conversation between government witness Katz and defendant Krol (A. 19-22), and of another telephone conversation between Katz and the principal offender, Madda (A. 23).

Their admission into evidence was error of constitutional dimensions.

Whatever may have been the prior holdings of the 7th Circuit Court of Appeals (*United States* v. *Pullings*, 321 F. 2d 287, 295; *Magee* v. *Williams*, 329 F. 2d 470, 473-474) on the strength of the dicta in *People* v. *Dixon*, 22 Ill. 2d 513, 516, 177 N. E. 2d 224 (1961), the Supreme Court of Illinois has now clearly ruled that the introduction of evidence in a criminal trial of a recording of telephone or other conversation made without the consent of all the parties is illegal. *People* v. *Kurth*, 34 Ill. 2d 387, 216 N. E. 2d 154 (decided March 24, 1966).

The *Kurth* decision was specifically called to the court's attention at the time of the trial in the case at bar (A. 41).

And the trial court specifically acknowledged that the Supreme Court of Illinois had decided a case exactly in point and mentioned the *Kurth* decision. Notwithstanding, the court admitted the tapes of the telephone and other recordings into evidence (A. 41).

The question is whether evidence obtained in violation of the criminal statutes of Illinois forbidding eavesdropping may be used in a federal prosecution, where there is no federal statute on the subject. The famous "silver platter" doctrine cases—*Elkins* v. *United States*, 364 U. S. 206 (1960) and *Rios* v. *United States*, 364 U. S. 253 (1960), strongly impel that such evidence as procured by the government witness Katz could not be used. *Elkins* and *Rios* struck down federal convictions where state officers had obtained evidence in contravention of state laws. The evidence so illegally obtained was then used in federal prosecutions, which this Court held constitutionally impermissible.

If the federal agents and officers attempted to use a tape recording of a telephone conversation obtained by them in a State prosecution, the holding in *Kurth, supra*, would prevent them.

What is presented here is a question of first impression. Federal agents and officers used evidence obtained in violation of Illinois statutes to convict in a federal prosecution. This may not constitutionally be done.

The Illinois Eavesdropping Act (Ill. Rev. Stat. 1963, Chap. 38, Article 14) provides as follows:

Section 14-1:

> "(a) Eavesdropping device.
>
> "An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by other means . . .

"(b) Eavesdropper

"An eavesdropper is any person, *including law enforcement officers,* who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article." (Emphasis added.)

Section 14-2 provides as follows:

"A person commits eavesdropping when he: (a) uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device."

Section 14-4 provides for a fine or imprisonment of any person convicted of eavesdropping.

And Section 14-5 provides that

"any evidence obtained in violation of this article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings . . ."

In *Kurth, supra,* certain public officials of a township were convicted of conspiracy to obtain money and property by false pretenses. Part of the evidence against them consisted of tape recordings of telephone conversations between one Smith and one Kurth. Smith, who was a State's witness, consented to the recording of the telephone conversations. The recordings were admitted into evidence over defendant's objections, as in the case at bar. The court took note that certain dicta contained in *People* v. *Dixon,* 22 Ill. 2d 513, 177 N. E. 2d 224 suggested that consent of one of the parties to the telephone conversation alone was sufficient to make the recording admissible. The Illinois Supreme Court stated, 216 N. E. 2d 157:

"It seems to us that the reasonable construction of the statute, which will insure the right of privacy, is that any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him . . . As to 'any party' who has consented, the recorded conversations are admissible; but as to the one party who has not consented, the recording is inadmissible . . . Since none of the other parties [than Smith] to the conversations had any knowledge that the conversations were being recorded and did not consent to such recording, the recordings are inadmissible against them. To the extent that *People* v. *Dixon*, 22 Ill. 2d 513, 177 N. E. 2d 224 may be construed to hold to the contrary, it is overruled."

Inasmuch as the manner in which the telephone and other recordings were obtained clearly violated the Illinois Criminal Code, this court has previously suggested what the trial court should have done. In *Lopez* v. *United States*, 373 U. S. 427 (1963), an Internal Revenue agent wired himself for sound and recorded an interview with Lopez who offered him bribes to discharge his functions improperly. The wire recordings were admitted into evidence over Lopez's objections. This Court affirmed; but indicated its decision would be otherwise if the device used by the government agent violated some statute or rule of procedure. Your Honors stated, p. 440:

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, *unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a Federal Court.* See e.g. *McNabb* v. *United States*,

318 U.S. 332 . . . *Mallory* v. *United States,* 354 U. S. 449 . . ." (Emphasis added.)

The Court of Appeals disposed of the Illinois ruling (*People* v. *Kurth, supra*) by stating that "federal and not state law furnishes the standard governing admissibility of evidence in a federal court." (Appendix "A")

Considering widespread evidence of illegal eavesdropping (see confessionals by the Attorney General) and considering the undisputed fact here of State criminality engaged in by the federal officers, this Court should decide whether *Lopez* v. *United States, supra,* applies, or whether some other standard of federal-state relations impel a holding prohibiting the use of electronic recordings as here demonstrated.

## III.

**An inconsistent verdict rendered by a trial judge may not stand.**

**The holding of the Seventh Circuit is in conflict with that of the Second Circuit on this point.**

The close relationship between conspiracy and aiding and abetting was clearly recognized in *Pinkerton* v. *United States,* 328 U. S. 640 where Your Honors stated, p. 647:

> "The criminal intent to do the act is established by the formulation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was an execution of the enterprise. *The rule which holds responsible, one who counsels, procures and commands another to commit a crime is founded on the same principle.*" (Emphasis added.)

In the case at bar the court found the defendant not guilty of conspiracy (Count 2); but in an inexplicable ruling found him guilty of the charges in Count 1—aiding and abetting in the commission of the offense (A. 4, 42). A reading of the indictment will demonstrate that the substantive offense charged in Count 1—aiding and abetting Madda to bribe Katz—is exactly what the defendant is charged with in Count 2—conspiring with Madda to bribe Katz (A. 1-2).

The counts are not only closely related but are, to all intents and purposes, identical. When the court found the defendant not guilty of Count 2, it was tantamount to a finding of not guilty on Count 1.

The defendant moved for a severance of the counts before trial (A. 3-4) and moved further that the government elect on which of the two counts it intended to proceed (A. 41). His motions were denied.

Assuming that the court had granted the severance and tried the defendant on the conspiracy count first with a finding of not guilty, could the court have found him guilty on a separate trial of Count 1? *Cosgrove* v. *United States*, 9 Cir., 224 F. 2d 146 (1954) and *United States* v. *Maybury*, 2 Cir., 274 F. 2d 899, hold that the conviction under circumstances here obtained cannot stand.

In *Cosgrove*, the defendant was charged with conspiring to defraud the United States of certain penalties for filing late tax returns and with "aiding, assisting, procuring and advising" in the filing of such returns. Cosgrove was found not guilty by a jury of the charge of conspiracy; as to the counts relating to the charge of aiding and abetting the jury could not agree and a mistrial was declared.

Defendant was retried, and was then convicted of the substantive aiding and abetting charge. The question was whether the conspiracy and the aiding and abetting issues were so identical as to prevent the second trial. The Ninth Circuit held that in view of defendant's former acquittal on the conspiracy count, the judgment of conviction against him in the second trial had to be reversed because of the application of the doctrine of *res judicata*.-*Cosgrove*, p. 156.

Although the posture of the case at bar is somewhat different because the inconsistent rulings were entered in the same case, the *reasoning* is the same because the facts upon which the defendant was convicted on Count 1 were identical with the facts upon which he was found not guilty on Count 2. It is obvious that one cannot be guilty of aiding or abetting another unless the other person has committed an offense, and unless the two—the aider and abettor and the principal—have a concert of criminal behavior leading toward the commission of the criminal offense. Similarly, the conspiracy allegation is one in which two individuals were charged with agreeing to commit an offense, which agreement is shown by a concert of action leading toward the commission of an offense.

A more cogent reason why the conviction cannot stand is that *an inconsistent verdict rendered by a trial judge based on the same set of facts will be reversed. United States* v. *Maybury*, 2 Cir., 274 F. 2d 899 (1960) is authority for this proposition. In a well reasoned opinion delineating the history of the law on inconsistent verdicts, the Second Circuit carefully pointed out the differences between inconsistent verdicts rendered by juries and those by trial judges sitting without juries. Because in a criminal case, "the jury has the power to bring in a verdict in the teeth of both

law and facts'' (*Horning* v. *District of Columbia*, 254 U.S. 135, 138) then a jury might properly render inconsistent verdicts.

The Second Circuit explained why in *Steckler* v. *United States*, 7 F.2d 59 at p. 60:

> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

And continuing to explain the legal propriety of jury verdict inconsistency, the same court stated later in *United States* v. *Maybury*, 274 F. 2d 899 at 903:

> "Another special consideration in connection with jury verdicts is the requirement of unanimity. And one does not challenge the 'voice of the country' for inconsistency among the jurors."
>
> "Ignoring inconsistency in a jury's disposition of the counts of a criminal indictment may thus be deemed a price for securing the unanimous verdict that the Sixth Amendment requires. *Andres* v. *United States*, 1948, 333 U. S. 740, 748, 68 S. Ct. 880, 92 L. ed. 1055. *Hibdon* v. *United States*, 6 Cir., 1953, 204 F. 2d 834, 73 ALR 2d 1130, and for interposing 'the voice of the country' against the possibly excessive zeal of prosecutors. *Steckler* and *Dunn* v. *United States*, 284 U. S. 390 thought it not too high a price for 'the most transcendent privilege which any subject can enjoy or wish for * * *' 3 Blackstone, Commentaries, 379."

With all this, the court went on to say that none of these considerations was fairly applicable to the trial of a criminal case before a judge. For, p. 903:

> "While the historic position of the jury affords ample ground for tolerating the jury's assumption of the power to insure lenity, the judge is hardly the 'voice of the country' even when he sits in the jury's place. If he deems an indictment multiplicitous, he has only to say so, and the time for him to exercise any 'lenity' that he deems warranted is on sentence. There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; *on the contrary, he should be forbidden this easy method for resolving doubts.* . . . We do not believe we would enhance respect for law or for the courts by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges that for historic reasons, has been granted the jury. *United States* v. *Dotterweich*, 1943, 320 U. S. 277, 279, 64 S. Ct. 134, 88 L. ed. 48. We know the rule of logic in law is not unlimited; but 'Holmes did not tell us that logic is to be ignored when experience is silent' (Cardozzo, the Nature of Judicial Process, 33). Since we find no experience to justify approval of an inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail." Emphasis added.)

The reviewing court merely held that the "result here is not so wholly irreconcilable with any rational theory that inconsistency is demonstrated." (App. "A"). But the court would have said the same thing had defendant been acquitted of aiding and abetting and been found guilty of conspiracy.

We know of no decision by this court on this point. We submit this case an appropriate one for consideration of the *Maybury* holding.

## CONCLUSION

On Point I, the Court of Appeals, although recognizing the impropriety of prosecutorial tactics—and even condemning them—failed to uphold the constitutional right to remain silent and the right to lawyer consultation—Fifth and Sixth Amendments to the Constitution; *Miranda* v. *Arizona*, 384 U.S. 436.

As to Point II, we respectfully submit the situation in this country is ripe for your Honors to speak where evidence was obtained by federal officers in violation of the criminal statutes of a State.

And with respect to Point III, the Seventh Circuit conflict with the Second Circuit as to inconsistent verdicts rendered by a trial judge hearing a case without a jury should be resolved.

We pray that Your Honors will consider this a fit case to warrant this court's attention.

Respectfully submitted,

GEORGE F. CALLAGHAN
JULIUS LUCIUS ECHELES
JO-ANNE F. WOLFSON
*Attorneys for Petitioner.*

APPENDIX "A"

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1966 — JANUARY SESSION, 1967

No. 15846
UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
vs.
FREDERICK B. KROL,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 27, 1967

Before HASTINGS, *Chief Judge,* and CASTLE and FAIRCHILD, *Circuit Judges.*

CASTLE, *Circuit Judge.* Frederick B. Krol, the defendant-appellant, prosecutes this appeal from a judgment of conviction and sentence entered by the District Court upon its finding that the defendant was guilty as charged in Count 1 of a two-count indictment. The cause was tried to the court without a jury. The defendant was sentenced to eighteen months imprisonment. Count 1 charged that the defendant in violation of 18 U.S.C.A. §§ 2 and 201(b) aided and abetted Carl J. Madda to corruptly give $200 to Erwin Katz, an assistant United States Attorney, with

intent to influence Katz' decision in connection with a civil case Katz was handling for the government. Count 2 of the indictment, with respect to which the court found the defendant not guilty, charged that the defendant conspired with Madda to violate §201(b), and it was as part of the conspiracy that defendant and Madda corruptly gave Katz $200 to influence him.

The contested issues presented by the defendant's contentions on appeal are: (1) whether the evidence is sufficient to sustain the conviction; (2) whether inconsistency in the court's findings requires a reversal; (3) whether the court's admission of evidence obtained in violation of the Illinois statute[1] forbidding electronic eavesdropping constitutes reversible error; and (4) whether the receipt of testimony that the defendant had refused to be interviewed by government agents concerning Madda's arrest deprived the defendant of a fair trial.

In resolving the issue of the sufficiency of the evidence to sustain the conviction, we must view the evidence, together with the reasonable inferences which may be drawn therefrom, in the light most favorable to the government. *United States* v. *Weaver*, 7 Cir., 360 F. 2d 903; *United States* v. *Abraham*, 7 Cir., 347 F. 2d 395, 396. So viewed, the record before us discloses that defendant was counsel of record for the plaintiff in a civil action (*Janus* v. *United States*) pending in the district court. Janus sought to recover damages under the Federal Tort Claims Act for injuries sustained in a collision involving a post office vehicle. Carl J. Madda, also an attorney, was handling the *Janus* case for Krol. Assistant United States Attorney Erwin Katz represented the government. On

[1] Ill. Rev. Stat. 1963, ch. 38, par. 14-1 et seq.

December 17, 1963, Katz increased to $500 a prior offer he had made to Madda that the government settle the case for $300. The defendant conveyed the $500 offer to his client, Janus, indicating that it was a "ridiculous" offer. Later, on December 17, the defendant, Madda and Katz met in Krol's office to discuss further the matter of settlement. Katz testified that at this meeting Madda twice offered Katz $200 to settle the case for $2,000. Katz stated that he was seated opposite Krol, at the latter's desk, and Madda was about three feet to Katz' right, facing Krol. He further stated that at the points in the conversation where Madda made these offers Krol had picked up the telephone in response to a call and was engaged in a telephone conversation. Katz did not know if Krol actually heard Madda make the offers.[2] Krol testified at Madda's trial that it was Katz who initiated the bribe offer. In a December 18, telephone conversation in which Katz sought to contact Madda concerning Madda's "offer" of the previous afternoon, the defendant inquired if he couldn't "do it" himself since Janus was his client and Madda was only helping out. The defendant suggested that a later meeting be arranged, and that he would get in touch with Madda. In his testimony at the Madda trial the defendant admitted leaving $200 for Madda, and stated that this was the money paid to Katz. Madda was arrested when he turned $200 over to Katz at a rendezvous following an interim meeting between Katz and Madda.

---

[2] In a separate previous trial Madda was convicted of a §201(b) violation in connection with the incidents here involved. The conviction was affirmed by this Court in *United States* v. *Madda*, 7 Cir., 345 F. 2d 400.

We are of the opinion that there is sufficient evidence to sustain the defendant's conviction. Defendant, by his own admission, was cognizant of a bribe attempt, although by his version it was Katz who initiated it. Following the bribe offer, the defendant offered to "do it" himself, and eventually provided Madda with the money involved in the payment.

After his December 17 meeting with the defendant and Madda, Katz reported the incident to the FBI and his December 18 telephone conversations with Krol and Madda, and his late afternoon meeting with Madda which preceded the payment of the $200 to Katz the next day, were tape recorded with Katz' consent. These recordings were admitted in evidence over the objections of the defendant. Their content served to corroborate Katz' testimony concerning the events involved. The defendant contends that *Lopez* v. *United States,* 373 U.S. 427, requires the exclusion of such electronic recordings as being unlawfully obtained and rendered inadmissible under the Illinois Eavesdropping Act (Ill. Rev. Stat. 1965, ch. 38, par. 14-1 et seq.) as construed and applied in *People* v. *Kurth,* 34 Ill. 2d 387. In this connection the defendant urges that we reject our recent holding in *United States* v. *Jones,* 7 Cir., 369 F. 2d 217, that in a federal criminal prosecution the admissibility of evidence of conversations obtained through the use of an eavesdropping device is governed by "[f]ederal and not state law". He asserts that such holding is out of harmony with the observation in *Lopez* (373 U.S. 427, 440) that:

> " . . . constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained — for example, by violating some statute or rule of procedure—compels the

> formulation of a rule excluding its introduction in a federal court. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332; *Mallory* v. *United States*, 354 U.S. 449."

But the facts involved in *Lopez*, the references to *McNabb* and *Mallory*, and the Court's declaration in the context which followed —

> "There has been no invasion of constitutionally protected rights, and no violation of federal law or rules of procedure."

—make it clear that the Court was speaking of federal rather than of state law or procedural rules. And the continuing validity of *Rathbun* v. *United States*, 355 U.S. 107, is expressly recognized in *Lopez*, which states (373 U.S. 427, 439):

> "The case is thus quite similar to *Rathbun* v. *United States*, 355 U.S. 107, in which we sustained against statutory attack the admission in evidence of the testimony of a policeman as to a conversation he overheard on an extension telephone with the consent of a party to the conversation."

We conclude that neither the existence of the Illinois statute nor its construction as applied to a state prosecution (*People* v. *Kurth, supra*) require a reappraisal of the federal rule of evidence applied in *United States* v. *Williams*, 7 Cir., 311 F. 2d 721, 725, or of the holding in our more recent decision in *United States* v. *Jones*, *supra*, that federal and not state law furnishes the standard governing admissibility of evidence in a federal court.

We are unpersuaded by defendant's contention that the judgment of conviction cannot stand because it is based on inconsistent findings. The court found the defendant not guilty on the conspiracy count of the indictment. In this connection the court said:

> " . . . that the evidence does not warrant the Court concluding beyond a reasonable doubt that [the defendant] is guilty of a conspiracy. The Court is of the opinion that he knew about it and he aided, but when I review the testimony of Mr. Katz in the matter, I cannot come to the conclusion that there was a conspiracy."

Aiding and abetting the commission of a substantive offense is a crime different from a conspiracy to commit the same substantive offense. *Colosacco* v. *United States,* 10 Cir., 196 F. 2d 165. Evidence establishing knowledge of another's criminal activity and an aiding of it does not of itself establish conspiracy. *Cf. United States* v. *Denny,* 7 Cir., 165 F. 2d 668, 670. The result here is not so wholly irreconcilable with any rational theory that inconsistency is demonstrated. See: *United States* v. *Wilson,* 2 Cir., 342 F. 2d 43, 45.

We agree with the defendant that the court, over defendant's objections, improperly permitted a government agent to testify that when, subsequent to Madda's arrest, the agent sought to interview Krol concerning the matter, Krol told him over the telephone that he desired to consult with an attorney prior to making any statement, and that when he visited Krol's office on two subsequent occasions Krol told him that he did not desire to make any statement regarding Madda or the arrest of Madda. The witness was first questioned concerning his conversation with Krol on one of the subsequent visits he made to Krol's office. The content of that conversation was admitted on the prosecutor's representation that one of the purposes of the testimony was to establish the witness' familiarity with the defendant's voice as a foundation for his identification of the defendant as the person with whom he had the earlier telephone conversation. But inasmuch as the

record discloses that the testimony concerning all three of the agent's conversations with the defendant reveals that the content of all of those conversations was substantially identical, resort to this strategy for the purpose of bringing the content of the conversations to the court's attention is to be condemned. *Cf. United States* v. *Watkins,* 7 Cir., 369 F. 2d 170.

But, this was a bench trial, and we do not regard the impropriety as constituting prejudicial error which requires a reversal. In the context in which it occurred we regard it as harmless. In ruling on the defendant's objections the court expressly declared:

> "All of this may stand solely for the purpose of showing that [the witness] had conversation of sufficient amount to know [defendant's] voice, according to his conversation, because a man has no obligation, as the law is clear, to testify, and refusing to discuss a matter is neither acknowledgment of guilt nor can be held against a person, so that is clear, but for the purpose of showing whether or not he knew his voice when he heard him, this is proper."

And defendant's reliance upon *United States* v. *Turnipseed,* 7 Cir., 272 F. 2d 106, is misplaced. *Turnipseed* involved a joint trial in which the trial court incorrectly considered a co-defendant's post-arrest statement as establishing the defendant's guilt as an aider and abettor. We there said (272 F. 2d 106, 107):

> "Some of Turnipseed's co-defendants made confessions. These confessions were not admitted in evidence as against Turnipseed. Nevertheless, the learned trial judge considered them as evidence against this defendant. The judge stated Turnipseed talked about

> the checks during the time he drove the automobile. The only evidence of any such statement was in a co-defendant's confession which is not in this record so far as Turnipseed is concerned."

Thus, *Turnipseed* affirmatively disclosed the court's reliance on improper matter to supply an element of proof critical to the establishment of Turnipseed's guilt. Here, we have a contrary situation. The trial court in his ruling expressly disavowed consideration of the testimony concerning Krol's conversation with the agent as bearing on the defendant's guilt. There is no basis upon which we can conclude that the court did so regard that testimony. Absent some affirmative disclosure to the contrary such as was presented in *Turnipseed,* a court trying a case without a jury is deemed to have considered only admissible and relevant material. *United States* v. *Oliver,* 7 Cir., 363 F. 2d 15; *United States* v. *Brooks,* 7 Cir., 355 F. 2d 540.

The judgment order appealed from is affirmed.

AFFIRMED.

**APPENDIX "B"**

# UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Monday, April 17, 1967

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

No. 15846 vs.

FREDERICK B. KROL,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause, filed by the defendant-appellant herein, be, and the same is hereby DENIED.

## APPENDIX "C"

### TITLE 18, U. S. CODE

Section 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 201:

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent

(1) to influence any official act; (shall be punished, etc).

The Illinois Eavesdropping Act (Ill. Rev. Stat. 1963, Chap. 38 Article 14) provides as follows:

Section 14-1:

"(a) Eavesdropping device.

"An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by other means . . .

"(b) Eavesdropper

"An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article." (Emphasis added.)

Section 14-2 provides as follows:

> "A person commits eavesdropping when he: (a) uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or
>
> (b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device."

Section 14-4 provides for a fine or imprisonment of any person convicted of eavesdropping.

And Section 14-5 provided that:

> "Any evidence obtained in violation of this article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings . . . "

# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 1395

FREDERICK B. KROL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 27, 1967. A petition for rehearing *en banc* was denied on April 17, 1967. The petition for a writ of certiorari was filed on May 15, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in a non-jury trial, petitioner was prejudiced by the admission of certain testimony, where the trial judge specifically stated that he would not consider such testimony as a factor tending to show guilt or innocence.

2. Whether tape recordings of conversations, made with the consent of one of the participants, were properly admitted into evidence.

3. Whether the trial court's decision was inconsistent.

## STATUTES INVOLVED

Article 14 of the Illinois Criminal Code of 1961, Ill. Stat. Ann., Ch. 38, Art. 14, provides in pertinent part:

> Section 14-1:
>
> (a) Eavesdropping device
>
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means * * *.
>
> * * * *
>
> Section 14-2:
>
> A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or

record all or any part of any oral conversation without the consent of any party thereto * * *.

* * * *

Section 14-5:

Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial * * *.

## STATEMENT

After a non-jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of aiding and abetting one Carl Madda to corruptly give $200 to an Assistant United States Attorney with intent to influence his official action in a pending civil matter, in violation of 18 U.S.C. 201(b).[1] On May 26, 1966, he was sentenced to imprisonment for eighteen months. The court of appeals affirmed the conviction (Pet. App. 1-8).

The government's evidence consisted primarily of the testimony of Erwin I. Katz, the Assistant United States Attorney in charge of the case of *Johnnie Janus* v. *United States*, a tort claims case alleging injuries sustained in a collision with a Post Office vehicle. The attorneys of record representing Janus were petitioner and one Carl Madda (A. 6).[2] In discussions relating to possible settlement of the case, Katz called Madda at petitioner's office and told

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[1] Petitioner was acquitted of conspiring to commit the substantive offense.

[2] "A." refers to appellant's appendix in the court below, which is on file with the Clerk of this Court.

Madda that he could not offer, on behalf of the government, more than $500. At Madda's request, Katz consented to a meeting at petitioner's office (A. 7). During the meeting, while petitioner was on the telephone with another client, Madda offered Katz $200 for himself if the latter would agree to a settlement of $2000. Katz refused to change the terms of the proposed settlement. Madda, again while petitioner was on the telephone, repeated his offer (A. 8-9).[3] Katz advised that he would telephone the following day. When petitioner concluded his telephone conversation, he suggested that the case should be settled promptly. Katz said, "Well, I'll call back tomorrow on the basis of what Carl (Madda) just said" (A. 10).

Katz immediately reported the terms of the Madda offer to his superior, who, in turn, notified officials of the Federal Bureau of Investigation. The following afternoon, with Katz' consent, agents attached a tape recorder to his telephone by means of a suction device attached to the earpiece. Katz then called petitioner's office and told petitioner that he was calling in response to the conversation which he had had with Madda the previous day (A. 10-11). Petitioner told Katz that Madda was not there, but that he could handle it himself, since the *Janus* case was actually his case. Katz replied that he would prefer to speak with Madda, and petitioner said that he would have Madda return the call later in the day (A. 11).

[3] Katz was unsure whether or not petitioner overheard Madda's solicitations.

Subsequently, Madda arranged to meet Katz in a nearby cocktail lounge (A. 12-13). Katz, who was equipped with a tape recorder, asked Madda if he was serious about the offer. Madda said, "Well, look, Erv, you scare me. You are talking like you have a tape recorder." After Katz apparently allayed his fears, Madda passed him a note on a napkin which said, "Okay on the deal" (A. 14-15).

At court the following day, Katz advised the judge that the case had been settled. At a nearby restaurant Madda passed Katz $200, and was arrested by surveilling agents (A. 18).

In addition to the above testimony, the government introduced a transcript of petitioner's testimony at Madda's trial.[4] Petitioner there admitted that he gave the $200 to Madda and that he was aware that the money was to go to Katz, but said that Katz had first broached the offer (A. 37-40).

## ARGUMENT

1. Over objection, F.B.I. Agent Bloom testified that, on two occasions after Madda's arrest, petitioner had refused to discuss the circumstances precipitating that arrest, and that, on one occasion, petitioner had said that he did not want to make a statement until he had consulted with counsel (A. 36-37).[5] As noted by the court below, the trial judge

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[4] In a separate trial, Madda was convicted of a violation of Section 201(b) based upon this incident. See *United States* v. *Madda*, 345 F.2d 400 (C.A. 7).

[5] It appears that the government offered this testimony in anticipation of petitioner's suspected defense (derived from

overruled petitioner's objection—based on the ground that the government was improperly attempting to create an adverse inference of guilt by showing his refusal to make a statement—expressly stating (Pet. App. 7):

> "All of this may stand solely for the purpose of showing that [the witness] had conversation of sufficient amount to know [defendant's] voice, according to his conversation, because a man has no obligation, as the law is clear, to testify, and refusing to discuss a matter is neither acknowledgement of guilt nor can be held against a person, so that is clear, but for the purpose of showing whether or not he knew his voice when he heard him, this is proper."

It is thus plain that the trial judge limited his consideration of this testimony to the purpose for which it was admitted—*i.e.*, to establish the evidentiary foundation that Agent Bloom recognized petitioner's voice on the telephone—and that he did not consider it as a factor tending to prove guilt or innocence. See *United States* v. *Oliver*, 363 F.2d 15 (C.A. 7); *United States* v. *Brooks*, 355 F.2d 540, 542 (C.A. 7). As stated in the latter case (355 F.2d at 542): "Our jurisprudence postulates the ability of judges to dismiss from their minds, in reaching decisions, offers

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his testimony in the Madda trial) that Katz initiated the illicit solicitation for a bribe. By showing that petitioner, himself an attorney and member of the bar, did not immediately report the alleged transgression (although opportunity was available), the government attempted to rebut the alleged defense.

of evidence excluded by rulings after hearing arguments on admissibility of that evidence." The evidence against petitioner was overwhelming, and he was not prejudiced by the testimony, the use of which was carefully limited by the trier of fact. Thus, the court below properly concluded that the admission of this testimony did not constitute "prejudicial error which requires a reversal," regarding it, "[i]n the context in which it occurred," as being "harmless" (Pet. App. 7).

2. In corroboration of the testimony of Katz, the court admitted, over petitioner's objection, the tape recordings of his conversations with petitioner and Madda, recorded with Katz' consent (A. 20-22, 23, 26-30, 41).[6] Petitioner contends that the conversations were recorded in violation of the Illinois eavesdropping statute (Article 14 of the Illinois Criminal Code), and were therefore inadmissible in the federal criminal proceeding.[7] As pointed out in the government's briefs in opposition in *Watkins* v. *United States*, No. 976, this Term, and *Martin and Parker* v. *United States*, No. 1235, this Term, in which cases certiorari was denied on February 27, 1967 and May 22, 1967, respectively, that statute proscribes only the use of an eavesdropping device to hear or record a conversation "without the consent of any

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[6] Petitioner did not object to Katz' testifying to the substance of the conversations.

[7] Petitioner properly does not argue that the conversations were recorded in violation of Section 605 of the Federal Communications Act. *Rathbun* v. *United States*, 355 U.S. 107, 109-111.

party thereto." Ill. Stat. Ann., Ch. 38, § 14-2. In *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E.2d 154, upon which petitioner relies, the Illinois Supreme Court did not hold that recording a conversation in the circumstances involved here constitutes a violation of the eavesdropping statute; it rejected this construction and held merely that, as a rule of evidence, the recordings so obtained were intended by the legislature to be admissible only against the consenting party in State court proceedings (216 N.E.2d at 158). Accordingly, there is no reason to consider the appropriateness of sanctions under this Court's supervisory power; the recordings so obtained were properly admitted in the federal criminal proceeding. See *Lopez* v. *United States*, 373 U.S. 427, 440; see also *Osborn* v. *United States*, 385 U.S. 323, 327-331).

3. The trial court's decision was not inconsistent in finding petitioner guilty of aiding and abetting Madda but not guilty on the conspiracy count. Aiding and abetting the commission of a substantive offense is a crime different from a conspiracy to commit the same substantive offense, *Bollenbach* v. *United States*, 326 U.S. 607, 611—the gist of the latter being an agreement to commit the substantive offense. On the facts of this case, where it was shown that petitioner gave Madda the $200 which he knew was to be given to Katz, the court properly concluded that petitioner aided and abetted the commission of a crime without necessarily reaching the conclusion that there was an agreement between petitioner and Madda to commit the offense, or that such an agreement had been

proved beyond a reasonable doubt (see Pet. App. 5-6). There was thus no factual inconsistency in the trial court's decision.[8]

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
*Attorneys.*

JUNE 1967

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[8] In rendering his decision, the trial judge stated (A. 42):

> The court is of the opinion that the defendant is guilty on Count 1, and so finds. As to Count 2, the court is of the opinion that the evidence does not warrant the court concluding beyond a reasonable doubt that he is guilty of a conspiracy. The court is of the opinion that he knew about it and aided, but when I review the testimony of Mr. Katz in the matter I cannot come to the conclusion that there was a conspiracy.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 265736 959

No. 1[redacted] 165

JOHN F. DAVIS,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

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FREDERICK B. KROL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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## REPLY BRIEF ON BEHALF OF PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

## No. 1395

FREDERICK B. KROL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

## REPLY BRIEF ON BEHALF OF PETITIONER

### Opinion Below

The opinion of the Court of Appeals is reported at 374 F.2d 776.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

**The investigating agent's narration of petitioner's refusal to talk with an FBI agent until he had consulted with an attorney—thrice repeated—invaded petitioner's constitutional rights.**

It was the opinion of the Court of Appeals (Pet. App. 7) and the argument of the government here (G. Br. 6-7) that the admittedly impermissible revelations of refusal to talk about the accusations did not prejudice the defendant because this was a bench trial and because the trial court stated that the conversations were revealed "for the purpose of showing whether or not [the FBI agent] knew his voice when he heard him . . ."

We present that it was wholly unnecessary for the agent to be permitted, over objections, to reveal the *content* of the conversations in order to testify that he recognized defendant's voice. The Court of Appeals said this was improper: ". . . resort to this strategy for the purpose of bringing the content of the conversations to the Court's attention is to be condemned." (Pet. App. 7). But, "This was a bench trial, and we do not regard the impropriety as constituting prejudicial error which requires a reversal." (Pet. App. 7)

Where errors of constitutional dimension occur, the petitioner's constitutional rights were violated—whether his trial was by jury or by bench.

2.

**The evidence of electronic eavesdropping conducted here violated a special state statute.**

Where federal officers violated the criminal laws of a State in the gathering of evidence, such evidence ought not be permitted in a federal prosecution.

In the original petition, we pointed out that your Honors suggested in *Lopez* v. *United States*, 373 U.S. 427, 440, that if eavesdropping devices were used in violation of some statute or rule of procedure, that the practice might taint the admissibility of such evidence.

We have demonstrated that federal officers violated the criminal statutes of the State of Illinois (Chap. 38, Section 14, Ill. Rev. Stat. 1963) and that the Supreme Court of Illinois has so interpreted that conduct such as that of the federal agents and officers here were violative of the statutes. *People* v. *Kurth*, 34 Ill. 2d 387, 216 N.E. 2d 154.

In its brief in opposition, the government misreads the holding in *Kurth*. The government states that, "... the Illinois Supreme Court did not hold that recording a conversation in the circumstances involved here constitutes a violation of the eavesdropping statute ..." (G. Br. 8) It is precisely what the Illinois Supreme Court did hold.

In *Kurth*, a town officer, one Smith, of a village in Cook County, Illinois, taped his conversations with the defendant Kurth regarding bribes and kickbacks to be paid. The facts with respect to electronic eavesdropping are identical to the case at bar. "Prior to the meeting, Smith concealed a small radio transmitter on his person and a receiver and tape recorder had been installed in Smith's office in the same building. The second and third recordings were of

telephone conversations between Smith and a secretary from whom a kickback was allegedly to be obtained and between Smith and Kurth. These recordings were made with the aid of an electronic device* which made it possible to hear both sides of the telephone conversation. The last recording was of a conversation between Smith, Kurth and the secretary and was made in the same manner as the first recording. All these recordings were admitted in evidence over the defendants' objections." (216 N.E. 2d 157).

The Supreme Court of Illinois held, 216 N.E. 2d 158:

> "It seems to us that the reasonable construction of the statute, which will insure the right of privacy, is that any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him."

As the petitioner did not consent to the use of such recordings, its use in evidence against him was plainly violative of the State legislative prohibition. The factual situations are identical; and the government's interpretation of the language of the Illinois Supreme Court is completely at variance with the plain holding of that Court.

As this issue will come before this Court again and again, it would aid the administration of criminal justice—at least in the federal district courts of Illinois—for your Honors to speak upon the subject.

And in this connection we call attention to the Court's recent (June 12, 1967) holding in *Berger* v. *State of New York*, (No. 615, Oct. Term 1966) holding that the wiretapping permitted by the New York courts was violative of the Fourth Amendment. Mr. Justice Clark stated, amongst

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* Identical to the one used in the case at bar.

other things, "We are advised by the Solicitor General of the United States that the federal government has abandoned the use of electronic eavesdropping for 'prosecutorial purposes.'"

The case at bar is one in which the government should abandon its prosecution at this level for the reasons stated in the *Berger* opinion.

3.

**The inconsistent verdict rendered by the trial judge ought not to stand.**

**The holding of the Seventh Circuit is in conflict with that of the Second Circuit on this point.**

The government has not answered the contentions made by petitioner in his brief on this point.

Where an inconsistent verdict rendered by a trial judge based on the same set of facts was reversed by the Second Circuit in *United States* v. *Maybury*, 274 F.2d 899, the Seventh Circuit opinion here is in conflict therewith.

The entire thrust of the government's case at trial was that Madda and Krol agreed to bribe Asst. U.S. Atty. Katz. It was the government's contention that the civil case attempting to be settled was Krol's. The meeting between Madda and Katz took place in Krol's law office. According to the government, Krol gave Madda the $200.00 "which he knew was to be given to Katz" (G.Br. 8). Had petitioner been found guilty of conspiracy, and if Krol complained of insufficient evidence, can anyone reading the record imagine that the government would contend—as it now contends—that there was no conspiracy proved?

To ask that question is to receive the obvious answer.

The trial court rendered an inconsistent verdict when it found defendant not guilty of the conspiracy but guilty of aiding and abetting. The Opinion of the Seventh Circuit Court of Appeals holds that there was no inconsistency. That holding is in conflict with *Maybury, supra.* Accordingly, this court should resolve the conflict in the holdings.

## CONCLUSION

For any or all of the foregoing reasons, we respectfully submit your Honors will consider this a fit case to grant its writ of certiorari.

Respectfully submitted,

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